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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LEON BAN-JYE KO, Defendant and Appellant.	B206135 (Los Angeles County Super. Ct. No. GA047651)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Leon Ban-Jye Ko (appellant) was convicted by a jury of first degree murder (Pen. Code, § 187, subd. (a)),[1] and willful, deliberate, and premeditated attempted murder (§§ 187, 664, subd. (a)). It also found that he personally used a firearm and inflicted great bodily injury in the commission of both offenses. (§ 12022.53, subds. (b)-(d).) In a separate trial, appellant was found to have been sane at the time he committed the offenses. He was sentenced to 75 years to life plus a consecutive life term in state prison. He appeals, contending that the trial court erred in determining that he was competent to represent himself at the preliminary hearing and in instructing the jury on adequate provocation and heat of passion. We find each of these contentions to be without merit and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Jong-Hsin Hong (Hong) lived with his wife Ai-Chin Liu (Liu) (collectively the Hongs), and their 11-year-old son, Michael Hong (Michael) in Temple City. In July or August 2001, they rented a room in their residence to appellant. On October 16, 2001, after Hong told appellant he wanted to cancel appellant's lease, appellant took out a handgun and shot Liu and Hong in the head. (Liu died as a result.) Michael ran into the garage, called 911, and told the operator that appellant had just shot his parents. Appellant got into his car and drove away. Sheriff's Department deputies responded to the call. They obtained a copy of appellant's lease, which provided his name and his vehicle information, and obtained a warrant for his arrest.

On October 21, 2001, Boulder City (Nevada) Police Officer Stephen Hampe saw appellant driving erratically near a fast food restaurant. Officer Hampe had the dispatch officer run appellant's license plate and learned that the vehicle was being sought by the Los Angeles County Sheriff's Department. He detained appellant and discovered that the vehicle had been painted and appellant had dyed his hair black. Later, Boulder City

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[1] All further statutory references are to the Penal Code.

police officers searched the vehicle and discovered ammunition, a two-month-old receipt for a handgun, and a receipt for spray paint. A handgun was found behind the fast food restaurant where appellant had first been spotted.

Appellant was arrested and transported to Los Angeles County Jail. Appellant told the registered nurse who examined him that he did not suffer from any mental problems and never had been treated for mental illness. Since appellant was cooperative and appeared to have no mental disability, the nurse did not refer appellant for a psychiatric assessment.

Appellant was arraigned on February 13, 2002. On April 17, 2002, appellant's counsel declared a doubt regarding appellant's competence to stand trial pursuant to section 1368.1. The court suspended proceedings, and appellant was evaluated by Dr. Kaushal Sharma. Dr. Sharma concluded that appellant did not suffer from mental illness and was malingering. At a hearing on June 10, 2002, the court reviewed Dr. Sharma's report and found appellant competent.

On August 12, 2002, appellant moved to proceed in propria persona. The court granted his request, but later appointed standby counsel, Rene Ramos.

On September 4, 2002, Ramos declared a doubt regarding appellant's competence to stand trial, and criminal proceedings were suspended. Appellant was evaluated by Dr. Kory Knapke. Dr. Knapke also concluded that appellant was not suffering from a mental illness and was malingering. On October 24, 2002, the court found appellant was competent to stand trial, and proceedings were reinstated.

At the preliminary hearing on January 8, 2003, appellant represented himself, with Ramos as standby counsel to assist him. During the hearing, appellant moved to exclude witnesses, objected to testimony, and cross-examined witnesses. He did not present any witnesses, but his defense, that he was not at the crime scene, was consistent throughout the preliminary hearing. Appellant was held to answer.

After appellant was arraigned on the information, he continued to represent himself over the next 11 months of pretrial hearings. On December 19, 2003, the trial court declared a doubt as to appellant's competence and relieved appellant of his pro. per.

status. It again appointed Dr. Knapke to examine appellant. Dr. Knapke concluded that appellant was suffering from paranoid schizophrenia. In February 2004, the court found appellant incompetent to stand trial and ordered him placed in the state hospital.

On July 12, 2006, another hearing was held regarding appellant's competence. Dr. Knapke and Dr. Sanjay Sahgal opined that appellant was competent to stand trial. On September 13, 2006, the court found him competent, and appellant voluntarily relinquished his pro. per. status. The court appointed Ramos to serve as defense counsel.

On June 6, 2007, appellant filed a motion to set aside the information, claiming he was mentally incompetent at the time of the preliminary hearing. Appellant's counsel argued that appellant's "bizarre" behavior at the preliminary hearing demonstrated appellant's incompetence. On July 31, 2007, the court denied the motion, stating: "This court has seen many instances where defendants, both represented and unrepresented, choose to use the preliminary hearing as an opportunity to assert and reassert their innocence and the fact they didn't commit the crime. That's their first opportunity to have a hearing and they believe that that's the time that issue should be litigated. So while I understand [defense counsel's] position, I don't think the only interpretation that this court can arrive at is that [appellant] didn't understand what was going on. So given the procedural context — given the fact that [appellant] appeared in many instances to be aware and articulating positions that were appropriate, the fact that he chose to articulate his innocence at that time or his problem with dealing with the case because it was his position that he didn't have anything to do with this offense, I don't find that clear evidence that he was incompetent at the time the preliminary hearing occurred."

At trial, Hong testified that appellant never had any visitors and spent most of his time in his bedroom. Appellant had poor hygiene, often wore the same clothes, and acted strangely. According to his lease agreement, appellant was entitled to keep food in a refrigerator in his room. Appellant kept food in the Hongs' refrigerator, even though the lease agreement did not specifically allow it. On October 16, 2001, Liu told appellant that she wanted to cancel the lease and have appellant move out. Liu removed appellant's food from the refrigerator and appellant became upset. Hong and Liu argued

with appellant about a number of issues, including the number of items he kept in the family's refrigerator and his failure to clean up after himself in the bathroom. Hong told appellant that he would cancel the lease and refund the rent if appellant moved out. Appellant became angry, took a handgun out, and shot Hong first, then Liu.

Michael testified that he ran into the garage, locked the door, and called 911. Michael said that appellant had behaved very strangely in the past, and had bad hygiene. Michael had previously asked his parents to kick appellant out of the house.

The prosecution presented evidence that when appellant filled out the application to purchase the weapon used in the killings, he denied suffering from mental illness. It also introduced evidence that appellant had previously purchased four other guns.

In his defense, appellant presented testimony from his sister, brother, and mother that he had previously manifested signs of mental illness. Another sister testified that she suffered from schizophrenia and was hospitalized several times for mental illness. A police officer who answered a domestic disturbance call in 1999 at appellant's brother's residence testified that appellant was acting strangely so the officer transported him to a psychiatric hospital for a temporary detention and evaluation. At that time, appellant was coherent, denied any hallucinations, and apologized for the incident. The examining doctor, Dr. Kaur, wrote that there was not enough information for her to make a definitive diagnosis, but did prescribe a one-week course of anti-psychotic medication, and discharged appellant after 72 hours. Appellant returned to live with his brother and mother without incident until late August 2000.

Dr. Kory Knapke, a psychiatrist, evaluated appellant in 2002, 2004, and 2006. In the first evaluation, he opined that appellant did not have a mental illness and there was no evidence of psychotic thinking or behavior. Dr. Knapke interviewed appellant a second time in 2004. This time, Dr. Knapke concluded that appellant suffered from paranoid schizophrenia. At the third interview in 2006, Dr. Knapke found that appellant had improved due to medication.

A third psychiatrist, Dr. Gregory Cohen, testified that he had interviewed appellant twice in March 2007. Dr. Cohen had reviewed police reports and medical records.

Dr. Cohen believed that appellant was suffering from schizophrenia on the date of the offense, and continued to do so at the time of trial.

In rebuttal, the prosecution called another psychiatrist, Dr. Ronald Markman, who testified that appellant was mentally ill, but was exaggerating his condition.

During the separate sanity phase conducted after defendant was found guilty, Dr. Cohen testified on appellant's behalf and said it was reasonable to conclude that appellant was delusional when he shot the Hongs, and that appellant's appearance supported the conclusion that he was mentally ill at the time of the offense. Dr. Cohen admitted that a reasonable case could be made either way as to whether appellant knew his actions were wrong. In rebuttal, the prosecution called Dr. Markman, who told the jury that appellant's actions in purchasing the murder weapon and fleeing the scene demonstrated that he knew the shooting was wrong.

DISCUSSION

I. Competency at the Preliminary Hearing

Appellant contends that the court erred in finding that he was competent at the preliminary hearing. He claims that he was denied the right to counsel due to his mental instability. He argues that he should have been afforded a second preliminary hearing once his condition was stabilized through medication.

Conducting a preliminary hearing when the defendant is mentally incompetent violates his or her right to due process. The defendant may move pursuant to section 995 or on nonstatutory grounds to dismiss the information. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 523; *People v. Duncan* (2000) 78 Cal.App.4th 765, 772-773.)

In order to represent himself at trial, a defendant must be competent to waive counsel. The defendant must demonstrate the present ability to consult with counsel with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceedings. The defendant must understand the significance and consequences of the decision to waive counsel, and the decision to forego must not be

coerced. (*People v. Stewart* (2004) 33 Cal.4th 425, 513.) A defendant is presumed competent unless it is proven otherwise by a preponderance of the evidence. (§ 1369, subd. (f); *People v. Sakarias* (2000) 22 Cal.4th 596, 617.)

A defendant's propensity for violence and history of psychiatric treatment do not necessarily indicate that he is incompetent. "[A]lthough defendant's prior violent acts and other bizarre behavior would lead us to agree he has violent propensities, and may even harbor a death wish, they do not raise doubts that he was incapable of assisting in his own defense or otherwise competent to plead guilty, admit the special circumstance allegations against him, or stand trial." (*People v. Ramos* (2004) 34 Cal.4th 494, 509, citing *People v. Grant* (1988) 45 Cal.3d 829, 859.) Evidence that a defendant has suffered a mental illness does not mean he is unable to understand the proceedings or assist in his own defense. (*People v. Smith* (2003) 110 Cal.App.4th 492, 502.)

If the defendant responds in an appropriate manner to questions posed, fully demonstrating an awareness of the circumstances he or she faces and the proceedings at trial, the record supports the conclusion that defendant was competent to waive his right to counsel. (*People v. Stewart, supra*, 33 Cal.4th at p. 517; *People v. Smith, supra,* 110 Cal.App.4th at p. 502.)

Although a court may not rely solely on its observations of a defendant in the courtroom if there is substantial evidence of incompetence, the court's observations and objective opinion do become important when no substantial evidence exists that the defendant is less than competent to plead guilty or stand trial. (*People v. Ramos, supra*, 34 Cal.4th at p. 509.) We review the trial court's findings for abuse of discretion at the time the ruling was made, and not by reference to evidence produced at a later date. (*People v. Welch* (1999) 20 Cal.4th 701, 739-743; *People v. Smith, supra,* 110 Cal.App.4th at p. 504.)

Here, the reporter's transcript reveals that appellant understood the nature of the proceeding and the significance and consequences of waiving counsel. He responded appropriately to the court's questions. During the hearing, he was able to make objections, two of which were sustained, conduct cross-examination of witnesses, and

maintain a consistent defense. We find it most significant that neither the judge nor appellant's standby counsel, who was the same attorney who filed the 995 motion, expressed any doubt as to appellant's mental competence. A defendant is presumed competent, and in the absence of a doubt to the contrary stated on the record of the preliminary hearing, he or she will be deemed lawfully committed by the magistrate. (*Booth v. Superior Court* (1997) 57 Cal.App.4th 91, 99 (*Booth*).)

Appellant argues that he was found incompetent in December 2003, 10 months after the preliminary hearing. He suggests that he "did not simply wake up in December 2003 with paranoid schizophrenia. It is a chronic condition that develops in early adulthood and, in this case, affected [him] since the late 1980s. [Record citation omitted.] So appellant was suffering from this illness at the time of his preliminary hearing." He acknowledges that "[t]he question is whether the illness was affecting his ability to understand the nature of the proceedings" at the preliminary hearing, and asserts that the "record shows that [he] was no more competent to stand trial in January 2003 than he was in December 2003, when he was, in fact, not competent." We are not persuaded.

Appellant properly frames the issue, however, he draws the wrong conclusion. The fact that he is a person with a mental illness does not establish that he was always incapable of understanding the nature of the proceedings against him. As set forth above, unless the court or counsel declares a doubt as to a defendant's competence to stand trial *at the time of the preliminary hearing*, a section 995 motion, such as the one filed in the instant case, is properly denied. (*Booth*, *supra*, 57 Cal.App.4th at p. 99.)

II. Jury Instructions

Appellant contends that two of the instructions given by the court, CALCRIM Nos. 570 and 603, incorrectly describe the doctrine of provocation, and because the erroneous instructions violated his federal constitutional rights, his conviction must be reversed.

He argues that the court's instructions improperly directed the jury to focus on whether the provocation was sufficient to cause a reasonable person to want to kill his or her provoker. He asserts that the law of provocation requires the fact finder to consider whether the provocation affected a reasonable person's mental state. In other words, the emphasis should be placed on a defendant's state of mind, not his or her specific actions. Under the law of manslaughter, this is a distinction without a difference.

CALCRIM No. 570 provides as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [¶] and [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. *The defendant is not allowed to set up* (*his*/*her*) *own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.* [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty." (Italics added.) Appellant objects to the italicized portion of the instruction.

CALCRIM No. 603 provides that an attempted murder can be reduced to an attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion. It further explains that in order for heat of passion to reduce the charge, the defendant must have acted under the direct and immediate influence of provocation and contains the same language describing provocation as used in CALCRIM No. 570.

CALCRIM No. 570 properly instructs the jury that the provocation must be sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, from passion rather than judgment. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) It also explains that no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless the facts and circumstances were such that the passions of the ordinarily reasonable man would be aroused. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) "The focus is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*People v. Najera* (2006) 138 Cal.App.4th 212, 223.) These legal principles are also set forth in prior versions of the instruction.[2]

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[2] Former CALJIC No. 8.42 provided in pertinent part: "The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time. [¶] The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment. If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the

We also note that CALJIC No. 8.42, which appellant claims "properly expressed the concept" of provocation, informs the jury that the "question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition *to act rashly and without deliberation and reflection, and from passion rather than from judgment.*" (Italics added.) We see no conceptual difference between this language and that of CALCRIM No. 570 that tells the jury to consider whether "a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts." We discern no error in the instructions.

In any event, appellant cannot establish he was prejudiced by any alleged error. The testimony at trial was undisputed that the argument which arose between appellant and the Hongs was over the food he kept in their refrigerator and his untidiness. The Hongs offered to refund his rent and terminate his lease. This was not a bitter, emotional dispute which would arouse the "heat of passion" necessary to reduce a killing to manslaughter. (*People v. Najera, supra,* 138 Cal.App.4th at p. 226.) An ordinarily reasonable person faced with the same situation would not react by shooting the landlord. There was no adequate provocation as a matter of law. (See *People v. Manriquez, supra,* 37 Cal.4th at pp. 585-586.) Moreover, appellant's defense focused solely on his mental state and his inability to form malice, not on whether the Hongs' actions constituted sufficient provocation. It is not reasonably possible that the jury would have reached a different verdict had the court omitted the portions of the jury instructions to which appellant objects. (*People v. Breverman* (1998) 19 Cal.4th 142, 165.)

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provocation and the fatal blow for passion to subside and reason to return, and if a lawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter."

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.